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Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 10 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1, and A/51/365)

1. Mr. ADDO (Ghana) said that the structure of the draft Code of Crimes against the Peace and Security of Mankind constituted a general framework within which key issues had been well identified and presented. His delegation welcomed the reduction in the number of crimes covered in the text adopted on second reading from twelve to five. That simplification should facilitate universal acceptance of the eventual end product of the work on the topic.

2. On jurisdictional issues, his delegation noted that article 8 envisaged a role for both national and international criminal systems in the case of the crimes set out in articles 17 to 20, but that the principle of concurrent jurisdiction did not apply in the case of the crime of aggression (article 16), over which the international criminal court was to have exclusive jurisdiction. Ghana took the view that, unless national criminal justice systems had ceased functioning or demonstrated reluctance to deal with the crimes in question, they must have the prerogative of trying individuals who had committed the crimes set forth in articles 17-20 of the Code.

3. The final form of the draft Code must be such as to ensure its universal acceptance, but no decision could be taken in that regard pending the outcome of the deliberations on the international criminal court.

4. With regard to article 20 (g), his delegation welcomed its focus on the protection of the environment but noted that conduct engaged in "with the intent to cause widespread, long-term and severe damage to the natural environment" did not occur only in wartime. Article 20 (g) should therefore proscribe such conduct in peacetime as well as in time of armed conflict.

5. Lastly, while it welcomed the thrust of articles 9 and 10, his delegation noted that the draft Code did not provide for any sanction in the case of non-compliance with those articles. The assumption of compliance on which the two articles depended might not be borne out by the actual course of events.

6. Mr. KOLOSSOV (Russian Federation) said that the main accomplishment of the forty-eighth session of the International Law Commission had undoubtedly been the completion of its lengthy work on the draft Code. At the current stage, however, detailed comment on the substance of the text would serve only to duplicate the debate taking place in the Preparatory Committee on the Establishment of an International Criminal Court. That was an inevitable result of the change that the underlying philosophy and conception of the draft statute of the court had undergone since it had begun to be considered by States. There had been a common understanding within the Ad Hoc Committee and the Preparatory Committee that the statute should include not only rules regarding the organization and functioning of the court, but also provisions formulating definitions of crimes and general principles of criminal law. Consequently,

much of the debate in the Preparatory Committee focused on issues addressed in the draft Code.

7. As to the ultimate destiny of the draft Code, his delegation considered that no decision should be taken on its future until work on the statute of the court had been completed. It had been proposed that the Code, or part thereof, should be incorporated in the statute, that the provisions of the two texts should be made compatible, and that the draft Code should be transmitted to the Preparatory Committee. His delegation found it hard to accept those proposals, given that the two instruments largely shared one and the same subject. It saw no need for two universal international legal instruments on one and the same set of issues, or for compatibility between the Code, which was the outcome of the work of independent experts, and the statute, which would be the result of negotiations among States. At the same time, the draft Code could prove extremely useful as a source for the work of the Preparatory Committee, and there was no need to adopt a special recommendation of the General Assembly to that effect.

8. Further discussion on the possible future of the Code as a separate document should be resumed once work on the statute of the court had been completed, at either the fifty-third or fifty-fourth session of the General Assembly. By then the content of the statute would be known, and it would be possible to compare it with the draft Code and to decide whether the latter should take the form of a separate document, and if so, what its content should be and what form it should take.

9. Miss RAMOUTAR (Trinidad and Tobago) noted that, with a view to reaching consensus, the Commission had considerably reduced the scope of the draft Code, which currently enumerated and defined just five core crimes. Her delegation welcomed the recognition by the Commission of the finding of the Nürnberg Tribunal that crimes against international law were committed by men, not by abstract entities, and that only by punishing individuals who committed such crimes could the provisions of international law be enforced. Her delegation also considered that the very general language used in article 3 on the issue of punishment was justified, since if the Code was to be enforced by an international criminal court, the penalties applicable would be set forth in an international convention.

10. The Commission had recognized the link between the elaboration of the draft Code and the establishment of an international criminal court. The draft Code and the draft statute both addressed crimes against the international community, and it was increasingly recognized that the deliberations on the two instruments should not continue to be isolated from one another. Her delegation thus joined other delegations that had called for harmonization of the work of the Commission and of the Preparatory Committee on the two issues.

11. With regard to the crimes enumerated in the draft Code, her delegation shared the Commission's view that individual responsibility for participation in the crime of aggression and the commission by a State of an act of aggression were related matters. It supported the inclusion of aggression as a crime under the draft Code, and suggested that a similar approach should be adopted in the

consideration of that crime under the jurisdiction of an international criminal court.

12. Genocide had long been recognized as a serious crime in international law, creating a grave threat to the peace and security of mankind. It was therefore appropriate that that crime should be covered by the draft Code. Her delegation also noted that there was widespread support for the inclusion of genocide as a crime under the jurisdiction of an international criminal court. With respect to crimes against humanity, it welcomed the inclusion in article 18 (k) of "other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm". That provision was important in that it covered acts now unforeseeable which might occur in the future and could thus be included within the provision of the Code without any need to amend the latter. The inclusion of war crimes as defined in article 20, and of crimes against United Nations and associated personnel, was also to be welcomed.

13. Her delegation regretted the exclusion of some of the crimes contained in the draft Code as adopted on first reading, in particular, the crime of illicit trafficking in narcotic drugs. That activity was transboundary in nature, perpetrated on a large scale, and posed a threat to the economic, political and social fabric of States. In the long term, the absence of an international legal forum to address that problem would prove extremely detrimental to the welfare of small developing countries, which were the most vulnerable to the activities of drug traffickers. Inclusion of that crime in the draft Code would underline its seriousness and indicate the international community's willingness to rid the world of it.

14. As to the final forms of the draft Code, her delegation urged that a link should be maintained between the draft Code and the draft statute of an international criminal court. If the former was to be incorporated in the latter, the crimes covered by the two texts should be harmonized, and a provision should be inserted allowing for the inclusion of other crimes of a similar nature in the draft Code, should such crimes arise in the future. Lastly, all the comments regarding the draft Code should be brought to the attention of the Preparatory Committee, to facilitate the progress of its work.

15. Mr. ZAIMOV (Bulgaria) said that the discussions in the Preparatory Committee on the Establishment of an International Criminal Court had facilitated the evaluation of the Commission's work on the draft Code. His delegation accepted the compromise decision to restrict the crimes covered by the draft Code to the five core crimes listed in articles 16 to 20, with a view to ensuring the widest possible acceptance of the Code. It considered, however, that there had been a strong case for retaining the former article 26 (Wilful and severe damage to the environment) as a separate crime, rather than as a war crime. At the same time, it welcomed the inclusion of crimes against United Nations and associated personnel, as such acts posed a direct threat to international peace and security.

16. The principles embodied in articles 11 to 15 were of particular importance, as they provided efficient guarantees of a fair trial. The principle of complementarity envisaged in article 8 should be further elaborated,

establishing a prerogative of national courts to try the perpetrators of the crimes covered by articles 17 to 20. An international criminal court should exercise its jurisdiction only where national jurisdiction had failed to bring the perpetrators to justice. His delegation also shared the view that consistency should be maintained between the draft statute and the draft Code, and that in order to avoid duplication of work the Preparatory Committee should give consideration to the proposal that the draft Code should be incorporated in the draft statute.

17. As to the form which the draft Code should take, his delegation would in principle welcome the incorporation of the draft Code in the statute of the court, but it would be premature to take a decision in that regard while the outcome of the negotiations in the Preparatory Committee remained unclear. On the other hand, if the Code was to be effective, it must be accepted universally and have binding legal force. Thus, his delegation was currently of the view that the draft Code should take the form of an international convention.

18. Bulgaria was committed to the fight against the most serious international crimes and therefore favoured the early establishment of a viable and effective international criminal jurisdiction, based on broad acceptance by States. No effort should be spared to ensure that the draft Code became a successful instrument of international law.

19. Mrs. ÁLVAREZ (Cuba) said that the draft Code would undoubtedly provide a basis for discussion in the Sixth Committee of the central and controversial issue of the definition of crimes coming within the jurisdiction of a future international criminal court. As the Preparatory Committee would have the opportunity to study carefully the most important legal aspects of the draft Code, and as there was a clear lack of consensus on the substance and form of the draft, it would be neither appropriate nor possible to take a final decision on it at the current session.

20. Her delegation was particularly disappointed at the drastic reduction in the list of crimes considered as serious international crimes. Colonial and foreign rule, State intervention, international terrorism and deliberately causing serious damage to the environment were a threat to international peace and security.

21. On the other hand, proposals had been included which lacked the juridical precision necessary to serve the legislative purposes of the International Law Commission. For example, while her delegation condemned all actions which threatened the safety of United Nations and associated personnel and understood the social and political reasoning behind the inclusion of such actions as "crimes" in the draft Code, she thought the proposal suffered from a serious lack of precision. Furthermore, Member States had not had the opportunity to submit comments on the issue either to the Commission or the Sixth Committee. Certain problems of a technical nature had to be addressed before that category of crimes was included in the draft Code. It had been included with undue haste, on the basis of an analysis of a convention which had been ratified by only four States. International consensus on a particular issue was no substitute for the accepted ratification procedure leading to the adoption of a legally binding instrument.

22. In view of those reservations and the need for further rigorous analysis, it would be counter-productive to act hastily. If the draft Code was to become an important source for the subsequent codification and progressive development of international law, it would need considerable revision, which she was confident would be forthcoming.

23. Ms. STEAINS (Australia) briefly traced the origins of the draft Code to the end of the Second World War and said she regretted it had taken so long for the Commission to complete its work on the draft. The end of the cold war had given States the opportunity to establish an effective legal regime to deal with the most serious international crimes, a task given added urgency by the horrific events in the former Yugoslavia and Rwanda. The fact that it had been necessary for the Security Council to establish ad hoc tribunals in response to those events demonstrated clearly the need for a permanent international criminal court. The General Assembly had responded by requesting the Commission to prepare a draft statute for such a court and the discussions on the draft Code had undeniably made a valuable contribution to the work of the Ad Hoc Committee and the Preparatory Committee, especially in helping to define the crimes which should fall within the jurisdiction of an international court. Her delegation welcomed the limitation of the number of crimes dealt with by the Code, which reflected the trend of discussions in the Preparatory Committee.

24. With regard to the form which the draft Code would take, her delegation strongly believed that the Preparatory Committee must continue to be the body responsible for dealing with the issues relating to the establishment of the international criminal court, including all the questions addressed in the draft Code. The outcome of the negotiations on the establishment of a court would provide the answer to the question of the form the Code would eventually assume. While recognizing that the Preparatory Committee would be drawing on aspects of the draft Code, her delegation believed that no action should be taken on the Code at the current session.

25. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapter III of the report of the International Law Commission, said that State responsibility was one of the pillars of the international legal system. Part one of the chapter covered a wide range of issues relating to the origins of international responsibility; part two dealt with various aspects of the content, forms and degrees of international responsibility; part three concerned the settlement of disputes; and two annexes contained provisions relating to the Conciliation Commission and the Arbitral Tribunal envisaged in part three. Part one had been completed in 1980, and since then the Commission had concentrated on parts two and three. At its previous session, the Commission had adopted several new provisions dealing with countermeasures and international crimes and had gone through all the articles in parts two and three to ensure consistency of terminology and make some clarifications.

26. Referring to the new provisions adopted by the Commission at its forty-seventh session, he said that article 47 concerned the right of an injured State to take countermeasures subject to certain conditions specified in articles 47 to 50. Paragraph 1 defined the purpose of countermeasures, which was to induce a wrongdoing State to comply with its obligations resulting from the wrongful act. He noted, however, that an injured State was only entitled to take

countermeasures as long as the wrongdoing State had failed to comply with those obligations and as necessary in the light of the response of the wrongdoing State to the demands of the injured State for such compliance. Paragraph 2 indicated that the right of an injured State to take countermeasures was subject to the conditions and restrictions relating to dispute settlement procedures, the principle of proportionality and the prohibition of certain types of countermeasures. Paragraph 3 provided that the taking of countermeasures by an injured State could not justify the breach of an obligation of that State towards a third State.

27. Article 48 presented the conditions under which an injured State could take countermeasures, while attempting to strike a balance between the interests of the injured and the wrongdoing State. Paragraph 1 required the injured State to negotiate at the request of the wrongdoing State before taking countermeasures, although interim measures to preserve its rights were permissible if they were otherwise consistent with the articles governing countermeasures. Paragraph 2 provided that an injured State which took countermeasures continued to be bound by its obligations relating to dispute settlement procedures. Paragraph 3 required the injured State to suspend countermeasures if the dispute was submitted to a tribunal with the authority to issue binding orders, or the dispute settlement procedure was being implemented in good faith, or the wrongful act had ceased. Paragraph 4 provided that there was no obligation to suspend countermeasures if the wrongdoing State failed to comply with a request or order issued pursuant to the dispute settlement procedure.

28. Because of the controversial nature of the notion of State crimes and its desire to avoid re-examining the articles contained in part one which had already been adopted on first reading, the Commission had limited its consideration to the consequences of "international crimes" (in contrast to "international delicts") in terms of international responsibility and dispute settlement procedures. He drew attention to the note to article 40 on the use of the term "crime"; while continuing to use the term for the sake of consistency, the Commission had noted that the penal implications of the term could be avoided by using alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act".

29. Article 51 established the general principle that an international crime entailed all the consequences of any other internationally wrongful act or so-called "international delict" as well as the additional consequences set out in articles 52 and 53. The phrase "any other internationally wrongful acts" was used to refer to the acts called "international delicts" in article 19, paragraph 4. In formulating the draft articles in part two, the Commission had consistently referred to the consequences of an internationally wrongful act, without distinguishing between crimes and delicts, on the understanding that the consequences would apply to all wrongful acts, and that any specific additional consequences resulting from international crimes would be addressed separately. The Commission had concluded that articles 41 and 42, concerning the cessation of wrongful conduct and full reparation respectively, were equally applicable to crimes. However, the Commission considered that the notion of full reparation for crimes or delicts should not extend to the means of subsistence of the population of the wrongdoing State, and had inserted a general limitation to that effect in article 42, paragraph 3. The Commission had also concluded that

restitution in kind, compensation, satisfaction and assurances, and guarantees of non-repetition should be available to a State that was the victim of an international crime. It had not considered it necessary to deal specifically with punitive damages for crimes in view of the various forms of reparation available. In addition, the Commission had considered that the limitations on restitution in kind and satisfaction with respect to delicts under article 43, subparagraphs (c) and (d), and article 45, paragraph 3, respectively, should be lifted in relation to crimes because of their exceptional gravity.

30. With regard to countermeasures, the Commission had concluded that all of the articles in chapter III of part two should apply without exception or modification to international crimes, attaching particular importance to the application of the provisions of articles 48, 49 and 50 to crimes.

31. Article 53 set out the obligations arising for all other States as a consequence of a crime committed by a wrongdoing State. The chapeau of the article embodied the general principle that a State crime entailed the obligations specified in subparagraphs (a), (b), (c) and (d) for every other State.

32. With regard to dispute settlement procedures, the Commission had concluded that the provisions in part three and the relevant provisions of the Charter of the United Nations were sufficient to deal with the characterization of a wrongful act as a "crime" as the term was used in article 19 and that it was unnecessary to design new procedures for that purpose. It had further drawn attention to the options of invoking Article 35 of the Charter or bringing the dispute to the attention of the General Assembly or the Security Council.

33. As indicated in paragraph 23 of its report, the Commission had identified three fundamental issues addressed in the draft articles on which the views of States would be particularly appreciated. One was the proposed distinction between international crimes and international delicts set out in article 19, and the difference in the consequences of those two categories of wrongful acts provided for in chapter IV of part two. The second issue concerned the provisions relating to countermeasures contained in chapter III of part two, and the third concerned the dispute settlement procedures provided for in part three and the two annexes.

34. Mr. HAFNER (Austria) said that the topic of State responsibility lay at the heart of the issue of the legal force of international law, since such force depended on the consequences which a breach of the rules of international law would entail.

35. Articles 47 to 50 appeared to provide a realistic solution to the problem of countermeasures. Article 47 set out the basic definition of the right of an injured State to take countermeasures, which was intrinsically linked to the definition of an injured State contained in article 40. For that reason, problems with the latter article, such as the qualification of all States parties to a multilateral treaty as injured in cases where collective interests were protected, also had a bearing on article 47. His delegation had previously expressed doubts concerning the enlargement of the meaning of "injured State". Furthermore, the relationship between article 47 and article 49 required

clarification; the criterion of "as necessary" contained in article 47, paragraph 1, appeared to place a time limit on countermeasures, whereas the Commission, in paragraph (6) of its commentary to article 47, indicated that the limits on such measures related to their "adequacy" or content.

36. Article 48 was one of the most hotly debated provisions of the chapter on countermeasures. The basic problem was not the formulation of the article, but the position of the principle of the peaceful settlement of disputes within the whole system of international law. While the introduction of the concept of interim measures of protection appeared to be an adequate solution, defining such measures remained a problem. In certain circumstances, where interim measures were permitted but countermeasures were not, it might be difficult to decide whether a particular reaction to an internationally wrongful act was or was not permissible, which would have obvious implications for foreign policy.

37. As to the relationship between the right to take countermeasures and the possibility of resorting to dispute settlement mechanisms, his delegation noted with satisfaction that its concerns had been taken into account by the Commission. Recourse to dispute settlement procedures was no longer the prerogative of the injured State alone; the alleged wrongdoer could now propose such procedures with a view to avoiding countermeasures.

38. Lastly, article 48, paragraph 4, was not very specific concerning the nature of the "request or order emanating from the dispute settlement procedure". As indicated in the commentary, such orders could also include those that were technically non-binding; it was unclear, therefore, whether they could include not only provisional measures indicated by a court, but also recommendations issued by conciliation commissions. The divergence in wording between article 48 and the commentary contributed to the uncertainty, since paragraph 4 referred to "the dispute settlement procedure" without further qualification, whereas the commentary referred to courts and tribunals.

39. At the previous session, his delegation had suggested that the concept of international crimes should be excluded from the draft articles on State responsibility, so as to make it possible to focus on the question of responsibility for internationally wrongful acts, or delicts. His delegation remained convinced of the usefulness of such an approach, especially since the gap between the consequences of such acts and those of crimes had been reduced, to the point where the concept of international crimes might not even be necessary. Article 53, for example, required all States "not to recognize as lawful the situation created by the crime". If, however, crimes were deemed to violate norms of jus cogens, then the obligation set out in article 53 was already part of primary law and did not need to be reiterated in the context of State responsibility.

40. Mr. BROWNLIE (United Kingdom) said that the submission of a complete draft, together with commentaries, of the articles on State responsibility was a significant and long-awaited event. While some of the draft articles, such as those dealing with the attribution of responsibility, had become an authoritative statement of international law, others would need to be modified if the final product was to be generally acceptable to States. His delegation

wished to make preliminary comments on three areas in which difficulties persisted, namely, State crimes, countermeasures and dispute settlement.

41. His delegation had previously expressed views ranging from cautious to sceptical on the proposed distinction between State delicts and State crimes; it was disappointing, therefore, to find that the relevant articles remained in the Commission's draft. While divergent opinions had been expressed by Governments during the debate, his delegation reiterated its view that the notion of a "State crime" had not gained the broad international acceptance required for a new concept with such wide-ranging consequences.

42. The point of distinguishing the concept of crimes from that of delicts, as the Commission indicated in paragraph (1) of its commentary to article 51, was that different consequences followed in each case. The Commission's very difficulty in working out what the legal consequences of a "State crime" might be served to reinforce the view that the concept lacked an adequate juridical basis and should not be retained.

43. It should also be pointed out that the concept of State criminality lacked the modalities for implementation. It was one thing to punish members of a Government or a high command for breaches of international criminal law on the basis of individual criminal responsibility, and quite another to punish a collectivity like a State, which meant punishing its population and economy. Punitive measures of that kind would raise major political, social and moral problems.

44. As to the question of countermeasures, in the current state of international organization, the right of an injured State to have recourse to countermeasures was unavoidable. All national legal systems retained some concept of countermeasures as a response to the violation of rights; there was something dangerously utopian in the notion that if only the international system could be developed further, then the concept of countermeasures could be dispensed with altogether. While there were good arguments for limiting and controlling such measures, his delegation believed that the limits must be practicable and that the controls must not hamper the exercise of the right to take countermeasures. Judged against those criteria, the preconditions set out in article 48, paragraph 1, seemed problematical. To demand prior negotiations as a condition for the lawfulness of countermeasures was to tilt the balance significantly in favour of the wrongdoer or putative wrongdoer. Nor could the balance be redressed satisfactorily by borrowing concepts of interim measures of protection from the field of judicial settlement. Lastly, there was something faintly perverse in the situation envisaged by article 58, paragraph 2, where, by taking countermeasures, the injured State acquired the right to have the underlying dispute settled by arbitration, but only if the wrongdoing State challenged the countermeasures. Overall, it seemed preferable to adhere to the more general guideline that countermeasures should be recognized as a legitimate measure of last resort, subject to a criterion of necessity.

45. Lastly, his delegation supported the inclusion in the draft of appropriate third-party dispute settlement procedures. Nevertheless, the general regime proposed for the settlement of disputes regarding the interpretation or application of the draft articles was very ambitious; it might be more realistic

to concentrate on those parts of the draft where, by common consent, compulsory procedures were desirable, as in the case of countermeasures.

46. With regard to future action on the draft articles, several options were available. One was to move towards the convening of an international conference to conclude a treaty, which appeared to be the assumption adopted by the Commission in its earlier work. That assumption, however, raised questions about the viability of so massive a piece of traditional codification under the current circumstances. His delegation believed, therefore, that alternative ways must be found of absorbing the Commission's work into contemporary international law. The United Kingdom had no preconceived views on the matter and looked forward to a thoughtful debate in the Committee and the Commission.

47. Mr. AL-BAHARNA (Bahrain) said that article 39 (Relationship to the Charter of the United Nations) had given rise to controversy. The effect of the provision was that once the draft articles had been adopted in the form of a convention, the relationship of such a convention to the Charter would be governed by Article 103 of the Charter, and the provisions of the Charter would thus prevail over those of the convention. His delegation suggested that the effect of article 39 could be modified and minimized through certain drafting changes. The word "subject" should be replaced by the words "without prejudice", and the words "as appropriate" should be deleted. The words "and procedure" should also be deleted. The article would then read: "The legal consequences of an internationally wrongful act of a State ... are without prejudice to the provisions of the Charter, etc.".

48. If that proposal was not accepted, the alternative would be to delete article 39 altogether. In the light of Article 103 of the Charter, such a provision was not needed to establish the priority of State obligations, and it was hardly conceivable that the draft article was intended to supplement Article 103, as indicated in the Commission's report.

49. His delegation had already expressed its views regarding articles 41 to 46 and did not think it necessary to revert to those provisions at the current session. His delegation had no difficulty, however, in accepting article 42 as currently drafted, with the addition of a new paragraph 3 proposed by the Drafting Committee.

50. Articles 47 to 50, which dealt with countermeasures, deserved comment. Article 47 allowed an injured State to take countermeasures against a wrongdoing State in order to induce that State to comply with its obligations under articles 41 to 46. The article stipulated, however, that the taking of countermeasures was subject to the conditions and restrictions set out in articles 48 to 50, and that the adoption of such measures against a State which had committed a wrongful act should not affect the injured State's obligations towards a third State. His delegation agreed that, while an injured State was entitled to take countermeasures against a State committing an internationally wrongful act, that right should be exercised only as a last resort, when the wrongdoing State failed to comply with its obligations. The article was well balanced and contained the necessary criteria for mitigating the impact of countermeasures on the wrongdoing State. A further mitigating element was to be found in the reference in article 47, paragraph 1, to articles 41 to 46, which

provided for a series of remedies to be sought in good faith by the State which had committed the wrongful act with a view to avoiding countermeasures. His delegation therefore supported article 47.

51. Article 48, which restricted the conditions under which an injured State might resort to countermeasures, was also well balanced and had his delegation's support, as did article 49 on proportionality and article 50 on prohibited countermeasures, which were self-explanatory. There was no need to expand the interpretation of the principle of proportionality any further, for the matter had to be left to the court concerned with the dispute settlement. Taken together, articles 47 to 50 maintained the balance between the interests of the wrongdoing State and those of the injured State. It should be noted that some members of the Commission, while approving the provisions on countermeasures contained in chapter III, preferred that the procedures for the peaceful settlement of disputes should be exhausted prior to the taking of countermeasures, a consideration discussed in a balanced manner in the commentary to article 48.

52. Turning to chapter IV, on international crimes, he said that article 19 had provoked heated discussion in the Commission, which had found it necessary to include a chapter on the consequences of an international crime committed by a State. The effect of chapter IV was that all the remedies applicable to international delicts would apply to international crimes, as would the provisions concerning countermeasures. The additional consequences applicable to international crimes were set out in articles 52 and 53. Paragraphs (c) and (d) of article 43 limited restitution in kind, as opposed to compensation, when it would seriously jeopardize the political independence or economic stability of the wrongdoing State. However, that limitation did not apply to international crimes because of their serious nature and in that case restitution could not be denied. His delegation had no difficulty in supporting chapter IV.

53. The members of the Commission had generally been in favour of the draft articles contained in part three, on the settlement of disputes. The dispute settlement mechanism provided for in those articles represented a bold step forward in the progressive development of international law, for the doctrine on dispute settlement had traditionally been based on consent to or free choice of means of settlement, whereas the current text made recourse to conciliation compulsory if either party rejected the other options. His delegation agreed with those members of the Commission who had thought the criticisms of such a compulsory mechanism groundless. It drew attention, in conclusion, to the importance which the Commission had attached to the provisions on dispute settlement.

54. Mr. HOFFMANN (South Africa), speaking on behalf of the 12 States members of the Southern African Development Community (SADC), said that the Commission had taken further strides forward at its latest session. The completion of the work on the draft Code of Crimes was particularly welcome, for the Code could now play a crucial role in the preparations for the establishment of a permanent international criminal court. One of the cornerstones of the court's draft statute was the absolute applicability of the principle of nullum crimen sine lege, so that during 1997 much attention would focus on the definition of the

crimes falling within its jurisdiction. The Commission had been wise to take note of the Preparatory Committee's work on the definition of crimes. The draft Code should be dealt with in 1997 in the context of the definition of the crimes to be included in the court's jurisdiction.

55. The Commission had asked the General Assembly whether the draft Code should be adopted as a convention, incorporated into the draft statute of the court or adopted as a declaration. To issue a declaration at the current stage might compromise the Preparatory Committee's work on the definition of crimes, and the General Assembly's decision on the fate of the draft Code would be influenced by the forthcoming negotiations on the draft statute. The SADC States therefore kept an open mind on the question.

56. The Commission had reached another milestone by completing the first reading of the draft articles on State responsibility. The SADC States supported the general drift of the draft articles and found the dispute settlement procedures and the conditions for the institution of countermeasures particularly encouraging. As small States, they emphasized that countermeasures were not always a satisfactory remedy between States of unequal size. The conditions and limits contained in the draft articles were therefore useful, as was the possibility of codifying binding international rules in that regard. The distinction between international delicts and international crimes should be retained.

57. The SADC States took note of what the report had to say about the other topics in the Commission's programme of work and about potential future topics and looked forward to further developments thereon. The member States would respond individually to the requests for specific comments. As to the Commission's future work, they had a preference for the topics of diplomatic protection and unilateral acts of States. The Commission should be encouraged to continue to identify new areas of work. The southern African region had nominated three of its eminent international jurists for election to membership of the Commission, a clear indication of its commitment to international law and its progressive development.

58. Mr. SIMMA (Germany) said that the topic of State responsibility still represented a huge task for the Commission and the road to the adoption of the draft articles might well be long and rocky. His delegation wished to respond to the Commission's request for comments on three of the issues involved.

59. First, the German Government had always been sceptical about the legal feasibility and political desirability of the concept of international crimes. Now that the entire system of the legal consequences of such crimes was on the table its apprehensions had not been dispelled. The two latest Special Rapporteurs had proposed a variety of safeguards subordinating individual responses to crimes of States to United Nations law and procedures, in order to "domesticate" the consequences of the Commission's decision to consider all States as "injured" by international crimes. The existing draft articles were devoid of any such safeguards but did provide for the relaxation of the usual limitations on claims for reparation and a set of obligations arising for all States. Furthermore, the provisions on dispute settlement did not contain any element of compulsory arbitration specifically designed to counter the dangers

of unleashing the concept of international crimes in an international legal environment still characterized by individual auto-determination of rights and duties.

60. Accordingly, his delegation wondered whether the world really needed a concept of international crimes entailing so many troubling consequences. With regard to the list of crimes contained in article 19, cases of aggression were already covered by the Charter system, particularly Chapter VII, and the law on collective self-defence; flagrant violations of the right to self-determination also fell under Chapter VII; human rights were the subject of a range of Charter-based and treaty-based procedures and, indeed, serious breaches of human rights obligations could also be taken up by the Security Council as threats to the peace; prevention of massive damage to the environment was a matter for multilateral treaties; and intentional pollution by a State was again a matter for Chapter VII. It might therefore be preferable to put the genie of international crimes back into the bottle. That would not save the Commission from having to address the repercussions of the related concept of obligations erga omnes in State responsibility but would enable it to go about that task in ways less prone to misunderstanding and possibly abuse. If the wish was to add a punitive element to the established rules on State responsibility, it would soon be possible to resort to the draft Code of Crimes and the international criminal court.

61. Second, with regard to countermeasures, the Commission was in principle to be commended for striking a careful balance between the rights and interests of injured States and those of States subjected to such measures. But some problems remained. For example, the concept of 'interim measures of protection' might well prove troublesome if such measures were exempt from the duties of prior negotiation and submission to arbitration, for an injured State might decide to resort immediately to such action, which the target State might regard as full-blown countermeasures. However, the concept might create an incentive for States to accept the element of compulsory arbitration contained in article 58, paragraph 2. That element ought to be protected against any attempt to destroy the balance by evading the obligation to resort to arbitration by means of a reservation while accepting the conventional licence to engage in countermeasures.

62. Third, on the question of dispute settlement, his Government welcomed the Commission's proposal to include some measure of compulsory third-party involvement, but it reiterated that there was no need to reinvent the wheel: the dispute settlement provisions should be expressly assigned a role subsidiary to the many existing procedures.

63. As to the final form of the draft articles, there was little chance of a binding convention on State responsibility being adopted. However, there did exist a solid body of customary international law on the matter which might be negatively affected by the adoption of such a convention. The Commission should therefore give serious thought to presenting its final product as a declaration or expository code. The commentaries to the draft articles were certainly more useful to the practitioner than the abstract draft articles themselves. It would be a pity if the Commission's work were to end up as a still-born treaty

which damaged the customary rules on State responsibility, even though unratified conventions could have an influence on State practice.

64. Mr. CALERO RODRIGUES (Brazil) said that at the forty-ninth session of the General Assembly his delegation had described countermeasures as "a distasteful institution" because they operated unfairly between stronger and weaker States and were not subject to any external control. Furthermore, even if the States concerned were of equal strength it was very doubtful that countermeasures would lead to fulfilment of the obligation of reparation. They would only create tensions between the States which would eventually have to be resolved by some peaceful settlement procedure. That result might be achieved earlier if such a procedure was adopted instead of countermeasures. Currently, a State suffering an injury as a result of an internationally wrongful act was entitled to take countermeasures, but such entitlement was based only on its own conviction, which might be an erroneous one. Of course, the State taking the countermeasures ran the risk of incurring responsibility itself if it later transpired that no wrongful act had been committed. The better approach would always be to seek a solution by peaceful means. If such means established that a wrongful act had been committed, then the injured State, if no other recourse was available, might be authorized to take countermeasures.

65. The measure of control established over the implementation of countermeasures was a step in the right direction; however, much remained to be done. In the interval between the failure of negotiations and the establishment of an arbitral tribunal, a State might be subject to the adverse effects of such countermeasures. It should be possible for either party to invoke arbitration unilaterally as soon as the dispute was characterized. It was pointless to delay recourse to arbitration, since it could effectively induce a State to comply with its obligation of reparation. His delegation agreed that measures for the preservation of rights should be taken immediately upon the occurrence of the wrongful act (article 48). However, "interim measures of protection" should be more precisely defined; a distinction should be drawn between such measures and countermeasures subject to the limitations of a general regime. In that context, it would be helpful if the arbitral tribunal could decide at an early stage whether the measures taken were truly interim measures and whether they were warranted.

66. The commentary to article 19 proved that the distinction between crimes and delicts was not arbitrary. As outlined in the commentary, the acceptability of that controversial distinction lay in the possibility of a meaningful statement of the consequences arising from each category of internationally wrongful act. However, the articles of part two, chapter IV, which established only very slight substantive differences in that regard, were not sufficient to justify the maintenance of the distinction established by article 19. Article 52, despite its promising title ("Specific Consequences"), was disappointing because it eliminated two limitations on restitution in kind and the restriction on satisfaction prohibiting demands impairing the dignity of the wrongdoing State. The Commission's justification for the elimination of that restriction seemed odd. Moreover, there was no discussion of differences in the instrumental consequences. It seemed unlikely that countermeasures, the highly individualized remedy provided for delicts, would also be appropriate in a case where the entire international community had been injured.

67. Referring to article 53, concerning the obligation of cooperation created by an international crime, he said that if a collective response by the international community was to be achieved through countermeasures, there must be a central institution with authority both to determine the fact that an international crime had been committed and to coordinate that collective response. The fact that the Commission believed that the United Nations could serve as the central institution amounted to recognition of the convergence of the law of State responsibility and the law of international security embodied in the Charter of the United Nations. The Charter contained provisions on the organization of a collective response to the wrongful acts of States which endangered international peace and security. Such acts were unquestionably breaches of obligations essential for the protection of the fundamental interests of the international community, referred to as international crimes in article 19. While the two categories of acts might not coincide completely, they should not be separated. It could be argued that, under the law of international security, decisions were taken by political organs and under the law of State responsibility, decisions would be taken by judicial bodies and would be binding on all States on questions relating to international crimes. No such judicial body existed and it was highly unlikely that the international community would agree to establish one. The concept of international crimes should not be included in the articles on State responsibility unless provision was also made for the establishment of machinery to deal with the legal consequences of such crimes. Otherwise, the distinction between the consequences of "international delicts" and "international crimes" would be purely descriptive or didactic, lacking the normative element which the Commission had considered essential in drafting article 19.

68. Mr. CAFLISCH (Observer for Switzerland) said that the thoroughness and detail of the draft articles on State responsibility, although commendable, caused unnecessary complications at times. One example was the sequence of articles 5 to 10 on attribution to the State of the conduct of various parties and entities, which was followed by article 11 on the conduct of persons not acting on behalf of the State. At other times, the text was repetitive. Article 17 on the breach of an international obligation did not add anything of significance to the principle set forth in article 16. Similarly, article 18, paragraph 1, and article 40 merely stated the obvious.

69. The distinction between international crimes and international delicts might create more problems than it would solve. It was a distinction that was meaningless unless the consequences entailed by the two categories of violations were drastically different. Article 52 (a), which did away with limitations on restitution in kind for an international crime, was particularly dangerous. It could be used to justify inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability. Moreover, to the extent that the concept of "crime" overlapped with violations of the peremptory rules of international law, all States could consider themselves to be "injured" within the meaning of article 40, paragraph 3, even without determining whether the conduct in question was considered a "crime". Furthermore, in the absence of a judicial mechanism that could be invoked unilaterally, wrongful conduct was characterized largely by the States concerned; thus, the conflict over the violation itself would be compounded by a further disagreement over its characterization. In fact, his

delegation had doubts about the appropriateness of establishing international crimes of States in addition to those of individuals. The exercise seemed to be an attempt to conceal the ineffectiveness of the existing rules on State responsibility behind an ideological mask. His delegation was therefore not in favour of drawing the distinction between crimes and delicts. It hoped that, during the second reading of the draft articles, the Commission would carefully reconsider whether it was necessary to do so.

70. Overall, the provisions on countermeasures were balanced and well-drafted. Nonetheless, the words "economic or political" should be deleted from article 50 (b), since environmental and other forms of coercion could also endanger the territorial integrity or political independence of a State. His delegation was satisfied with the provisions on the settlement of disputes with respect to countermeasures. However, with regard to the settlement of disputes in general, a conciliation procedure that could be invoked unilaterally, welcome as it was, was insufficient. If conciliation failed, each State must be able to launch a judicial process that would culminate in a binding verdict. That alone would ensure the effectiveness of any future convention on State responsibility.

71. His delegation also wished to comment on some specific articles. With regard to article 19, it might be useful to establish a connection between the crimes of States and the crimes committed by individuals, as defined in articles 16 to 20 of the draft Code of Crimes. Article 19 on State responsibility did not in fact mention war crimes, crimes against humanity and crimes against United Nations and associated personnel, which might entail State responsibility in addition to the criminal responsibility of the individual perpetrators. It would be paradoxical if that latter responsibility could come into play without the concomitant responsibility of the State.

72. The provision on the complicity of States contained in article 27 had no foundation in positive law and embodied a purely causal responsibility; it should be deleted from the text. The second aspect of the problem dealt with in article 28 - the responsibility of a State victim of coercion - should be addressed in the provisions on circumstances precluding wrongfulness contained in chapter V.

73. Article 37, on lex specialis, rightly provided that the rules of international law governing a particular situation should prevail over the general provisions contained in the draft articles. However, it might be appropriate to enter a reservation concerning article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, which enabled a contracting party to terminate a treaty with respect to another contracting party which had violated the treaty's basic rules. The current wording of article 37 might give the impression that that specific reaction excluded any other consequences, i.e. those deriving from the draft articles on State responsibility. That was not the case, and the situation should be clarified.

74. Article 45, paragraph 2 (c), seemed to cover ground already covered in article 44, paragraph 2, and should perhaps be deleted.

The meeting rose at 1.10 p.m.